The Paris Agreement

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The Paris Agreement: A Rejoinder

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In his analysis of the recently adopted Paris Agreement (http://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-i-of-ii/), Professor Jorge Viñuales shed light on the main features of this new treaty. He concludes that, while the Agreement is not perfect, it is certainly 'more than many of those who have followed the climate negotiations over the years realistically expected.' I cannot but agree with this assessment: the Paris Agreement is probably the best that could be achieved at this place and time and, given the premises, its adoption as a treaty last December was almost miraculous. This post expands upon a couple of points raised in his analysis, focusing on the legal form of the Paris Agreement, its relationship with the UNFCCC and on the nature of obligations concerning the review of parties' commitments.

Legal form

The Paris Agreement was from the outset meant to be 'a protocol, another legal instrument or an agreed outcome with legal force' under the UNFCCC (Decision 1/CP.17, at 2). The issue of legal form, nevertheless, was an elephant in the room during much of the lengthy negotiations that led to the adoption of the new agreement.

On one end of the spectrum, some parties favored a protocol, in keeping with the practice to perfect and further substantiate parties' obligations under framework conventions – like the UNFCCC – by adopting ancillary treaties, commonly referred to as protocols – like the Kyoto Protocol to the UNFCCC. On the other end of the spectrum, other parties were uneasy about the legal form of the Paris Agreement. The US had domestic political reasons to ask that the agreement's legal form be left undetermined, so as to enable presidential ratification without Senate approval (Ku

Annalisa Savaresi

Annalisa Savaresi (http://www.law.ed.ac.uk/people/annalisasavaresi) PhD, is a Research and Teaching Fellow in Global Environmental Law, University of Edinburgh Law School.

(http://www.epw.senate.gov/public/_cache/files/29525f03-9fc4-4112-9488-701f3dc1e8d1/ku-testimony.pdf), 2015). Other parties too, however, were wary of the legal implications attached to encapsulating in a protocol the bottom-up, pledge and review architecture that emerged from the ill-fated Copenhagen Conference in 2009 (Copenhagen Accord (http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php)). This architecture hinged on parties' 'nationally determined contributions' (NDCs), rather than on a set of collectively negotiated targets enshrined in a treaty. The legal character of NDCs was the subject of much speculation before the adoption of the Paris Agreement (see for example, Bodansky and Rajamani (http://www.c2es.org/docUploads/legal-issues-brief-06-2015.pdf), 2015). After the adoption of the agreement, it seems timely to reflect both on the legal character of NDCs, as well as of the Paris Agreement. I will examine these two matters in turn.

NDCs

In his post suggests that NDCs 'may qualify under international law as both a binding unilateral act and as a "subsequent agreement" (Article 31(3)(a) VCLT) interpreting provisions of the UNFCCC and the Paris Agreement.' I am not sure NDCs can be viewed as either. In *Nuclear Tests Case*, the International Court of Justice (ICJ) famously described unilateral acts as follows:

> It is well recognized that declarations made by way of *unilateral* acts, concerning legal or factual situations, may have the effect of creating legal obligations (…) When it is the *intention* of the State making the declaration *that it should become bound* according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. (*Nuclear Tests Case* (http://www.icj-cij.org/docket/files/58/6093.pdf) [Australia v France] para. 43, emphasis added)

It seems disputable whether NDCs may be regarded as unilateral acts, as they seem to miss the 'intention' to be bound highlighted by the ICJ, or 'will to be bound' to use the terminology deployed by the International Law Commission (ILC) (ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_9_2006.pdf&lang=EF), 2006, 1). Whether NDCs may qualify as subsequent agreements between the parties 'regarding the interpretation of the treaty or the application of its provisions' under Article 31(3)(a) VCLT also

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Jordan p.s. please see the Egregious Errors draft article with respect to the so-called persistent objector preference and why it is not part of customary international... – **Feb 16**

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seems doubtful, given their unilateral nature.

Whilst parties' interpretation of the legal character of NDCs will only become clearer with the implementation of the Paris Agreement, the provisions anchoring NDCs in the treaty provide some useful clues in this connection. Article 4.2 of the Paris Agreement says:

> Each Party *shall* prepare, communicate and maintain successive *nationally determined contributions* that it intends to achieve. Parties *shall* pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. (Emphasis added)

I have argued elsewhere (http://www.tandfonline.com/doi/full/10.1080/02646811.2016.1133983) that this provision clearly imposes obligations of conduct upon all parties, which are rather different in nature from the obligations of results enshrined in the targets included in the Kyoto Protocol for developed countries (Kyoto Protocol, Article 3.1 and Annex B). NDCs will be the paradigm against which parties' performance of their obligations under the Paris Agreement will be assessed. As such, NDCs that parties will submit over time could be considered 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,' pursuant to Article 31(3)(b) VCLT.

Paris Agreement

As pointed out also by Pauwelyn and Andonova (http://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/), the diatribe on legal form that accompanied the final stages of the negotiations of the Paris Agreement was often misreported in the media. It is therefore important to underscore, as Viñuales does, that the Paris Agreement unquestionably is a treaty, as defined in the Vienna Convention on the Law of Treaties (VCLT, Article 2.1). There are several clues to this effect, not least the final clauses concerning the agreement's ratification and entry into force (Paris Agreement, Articles 20 and 21).

As a treaty, the Paris Agreement will be formally binding upon its parties. The scope of parties' obligations, nevertheless, will depend on the interpretation of the language in each provision. Some provisions in the Paris Agreement unequivocally assert categorical obligations, such as, for example, that to pursue domestic mitigation measures (Paris Agreement, Article 4.2). Others, instead, are

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expressed in less categorical terms, like those concerning developed countries' leadership in undertaking mitigation action, or developing countries move towards emission reduction targets (Paris Agreement, Article 4.4). Others again have a merely enabling character, and are meant to facilitate internationally coordinated action, rather than prescribe it – such as, for example, those concerning the joint implementation of parties' obligations (Paris Agreement, Article 6).

The nature of obligations enshrined in the Paris Agreement will therefore depend on the way they are termed in the treaty; and, most importantly, on parties' interpretation of these obligations in the practice of implementation. The practice of implementation may turn what may sound like hortatory provisions into a sophisticated web of reciprocal state obligations, and, conversely, turn into dead letter what were construed as categorical obligations.

Relationship between the Paris Agreement and the UNFCCC

The relationship between treaties is typically determined by parties' intention, as well as by the nature of the treaties (Boyle and Chinkin, The Making of International Law, 248). Clues on both of these elements emerge from Article 2.1 of the Paris Agreements, which says:

> This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change…

This provision unequivocally conveys the idea that the Paris Agreement is linked to the UNFCCC, in what can be characterized as an ancillary position. This impression seems to be confirmed by the references to the UNFCCC principles (Paris Agreement, Preamble and Article 2) and institutional arrangements (Paris Agreement, Articles 17-19), pretty much in the same way as this was done in the Kyoto Protocol (Preamble and Articles 13-15, respectively). As such, the Paris Agreement could be considered an implementation agreement – like the 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea – or a protocol to the UNFCCC in anything but name. The latter conclusion is suggested by a number of clues, not least the fact that the Agreement's ratification is open only to UNFCCC parties (Paris Agreement, Article 20.1).

While the difference between an implementation agreement and a protocol is largely a matter of semantics – and the dictum '*de nominibus non est disputandum*' comes to mind in this connection –

this detail may have important implications for the interpretation of the provisions in the Paris Agreement. For example, the agreement makes reference to 'developed' and 'developing' countries, without providing a definition for these terms. If these terms were to be interpreted in light of the UNFCCC, this would entail a return to the controversial static party categories embedded in the Convention's Annexes, which so many were adamant to leave behind. The Paris Agreement's silence on this, and the reference to common but differentiated responsibilities and respective capabilities 'in the light of different national circumstances' (Paris Agreement, Article 2.2) may together be interpreted as an expression of the drafters' will to move beyond the approach to differentiation embedded in the UNFCCC. Further light on this, as on so many other matters concerning the relationship between the UNFCCC and the Paris Agreement, is likely to emerge at forthcoming negotiations to prepare for the implementation of the Paris Agreement.

Implementation, compliance and effectiveness review

The provision of information is a crucial ingredient of international environmental agreements, both to ensure the monitoring of problems that parties seek to tackle (in the case of the climate regime, the emissions of greenhouse gases), as well as to review parties' adherence to the substantive obligations they have undertaken. It seems worthwhile reflecting further on what is actually new in the review mechanism established by the Paris Agreement, and why this is important.

The implementation of the reporting and review procedures under the UNFCCC and the Kyoto Protocol has evidenced some fundamental shortcomings. First, the lack of a standard template to report parties' pledged action under the UNFCCC hindered comparison between their efforts. Second, there was no mechanism to adjust parties' pledged action and 'ratchet up' ambition over time. Third, developing countries struggled to comply with their increased reporting obligations, thus drawing attention to the need for dedicated assistance and capacity building.

The Paris Agreement builds and expands upon existing review procedures under the climate regime, potentially addressing these shortcomings. First, the agreement launched the development of a set of rules to standardize parties' reporting of information (Paris Agreement, Article 4.13 and Decision 1/CP.21, at 31). A Capacity-building Initiative for Transparency is set to support developing country parties in meeting their enhanced transparency obligations (Decision 1/CP.21, at 85). Most crucially, the Paris Agreement has introduced a non-bifurcated process to review implementation

(Article 13), which will build on and supersede extant review arrangements (Decision 1/CP.21, at 99).

The relationship between this review process with the 'expert-based' 'facilitative' 'non-adversarial' and 'non-punitive' compliance mechanism created under the Paris Agreement (Paris Agreement, Article 15) remains to be ascertained. The text of the agreement does not indicate whether expert reviewers will be able to independently raise questions of compliance before the newly established compliance committee. Yet, the very existence of a mechanism to consider questions of compliance for all parties, rather than for developed ones only, is a major novelty in the climate regime.

Even though the details of this compliance mechanism remain to be determined, it is clear that it will follow what has been described as a managerial, rather than an enforcement model (Bodansky, The Art and Craft of International Environmental Law, 236). In other words, the compliance committee of the Paris Agreement will not so much aim to 'coerce compliance' and impose sanctions upon parties, but rather 'encourage compliance' by enabling parties' consultation, cooperation and peer pressure. This approach to compliance is predominant in international environmental agreements. In this connection, the Paris Agreement seemingly places on continuum what Vinuales calls information based techniques and the management of non compliance, with the review of compliance representing the final stage of the process to review parties' implementation of their obligations.

Finally, the alignment of parties' action with the 2° C goal enshrined in the Paris Agreement will be periodically assessed, by means of a so-called stocktake exercise, which, at least in theory, will serve to induce parties to adjust their action (Paris Agreement, Article 14.3). How this process will actually work in practice remains to be seen. Yet this global stocktake potentially is a clear evolution when compared with the lack of means to ratchet up ambition under the 2013-2015 Review.

Paris Agreement: a new start?

The adoption of the Paris Agreement is just the beginning of a new regulatory season, whereby parties will flesh out the rules to assist its implementation. This secondary rules development process will begin at the next session of the UNFCCC subsidiary bodies, in May 2016 and will reveal whether the Paris Agreement has truly marked the beginning of a new era for international climate governance. While much hard work lays ahead, the outlook for this process is certainly the most hopeful it has been for quite some time.

Compared with the UNFCCC, the Paris Agreement is better aligned

with current emission patterns and more realistically equipped to frame future internationally coordinated climate change action. The agreement is a great leveler of parties' obligations, most saliently those related to mitigation and the provision of information. The legal architecture drawn in the Paris Agreement greatly hinges on parties' procedural obligations. Compared with the Kyoto Protocol, the diminished legal force attached to parties' substantive commitments is compensated by the universal nature of parties' obligations, as well as by a unitary system for the review of implementation, compliance and effectiveness.

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